APPENDIX A

COURT OF APPEALS
TENTH SUPREME JUDICIAL DISTRICT OF TEXAS
At Waco

No. 10-81-001-CR
Trial Court No. 81-179-C

Henry Washington Erwin, III,
Appellant,

v.

The State of Texas,
Appellee.

FROM 54th JUDICIAL DISTRICT COURT,
McLENNAN COUNTY, TEXAS

OPINION

Affirmed June 3, 1982

Appellant was convicted of conspiracy to engage in organized criminal activity and sentenced to not less than two nor more than five years confinement and a $5,000.00 fine.

The Appellant was indicted for the offense set out in TEX. PENAL CODE ANN. § 71.02(a)(5). Essentially, he was charged with conspiring with five or more persons to unlawfully possess marihuana by fraud, misrepresentation and deception. Appellant raises eleven grounds of error, five of which challenge the sufficiency of the evidence to sustain the conviction. Thus, a summary of the evidence is pertinent.

Banks, an aircraft broker, sold a Twin Beech airplane to Alpha K Industries, a sham corporation, through Harris in 1978. Later, Harris told Banks he wanted a larger plane. Banks located a Convair at the end of 1979 in Kissimmee, Florida and bought it at Harris' urging for $95,000.00 from the sheriff in Kissimmee. The plane had been seized by the sheriff because it had been used for running marihuana.

The Convair was not airworthy. Harris told Banks to get the plane ready to fly, that he was sending Stanfield (a/k/a Baldi) as a pilot and sent Banks cash for repairs and fuel. Banks obtained a ferry permit to bring the plane to Waco.

Baldi and Appellant met Banks in Florida, and they flew the Convair to Crestview, Florida, with Appellant piloting. At Crestview a U.S. Customs Agent went on board where Appellant identified himself, but Baldi introduced himself as Stanfield and said he was only a "passenger." No passengers were allowed under the ferry permit. Inside the plane the agent saw a map of northern Colombia. All the seats and normal equipment for such a large aircraft were missing.

A Convair is used almost exclusively for smuggling. A U.S. Customs official testified a legitimate use for a Convair is financially impossible considering the cost of fuel and the expense of operating the large, older aircraft. It would have cost an additional $65,000.00 to $70,000.00 to get the plane certified for legal cargo flights. Such a plane is used for marihuana rather than other drugs because a Convair can carry a great deal of cargo. Cocaine and similar drugs are carried in smaller amounts to minimize the loss in the event of a crash.

Colombia is a major source of marihuana supply for the U.S.

The plane left Crestview with Appellant at the controls. Several witnesses saw the plane land in Waco at the TSTI campus airfield on March 21, 1980. Banks, Baldi and Appellant deplaned.

Thereafter, Harris told Banks the plane was to be used to "run a load" which means hauling marihuana; the plane was to carry about 10,000 pounds of marihuana. The Convair was originally equipped to hold 1,710 gallons of fuel, but Harris ordered additional bladder fuel tanks so that the plane would hold another 1,250 gallons. The tanks cost at least $5,500.00. Harris wanted the Convair to be able to fly 18 hours or about 2800 miles, the approximate distance of a round trip to Colombia. The plane was also modified to carry more oil, and a power booster and a directional radio were installed at Harris' insistence. All the work was paid for in cash. Fuel was bought with cash or cashier's checks and traveler's checks bought with cash.

On April 16 witnesses at the airfield saw Banks arrive in his Cadillac and Baldi and Appellant arrive in a Thrifty rental car. The three men boarded the plane and performed three touch-and-go landings for practice. By this time the ferry permit had expired, and the flights were illegal. A man of northern Colombia was found inside the Thrifty rental car after it was returned.

The Convair was fueled with 1,235 gallons on April 29. The plane left the airfield on May 4 at about 7:45 p.m., and a witness saw a maroon pickup, which had been seen periodically at the airport during the investigation, leaving the airport after the plane was airborne.

The Convair returned to the airfield about 8 a.m. May 5. Appellant and Baldi were piloting the plane. At 6:30 p.m. on that same day, Appellant, Baldi and an unidentified male loaded boxes, green plastic jugs,

briefcases, clothing, camping gear, and backpacks in the Convair. Other men, one identified as Solano, assisted. The Convair requested permission to take off and began to taxi but returned after reporting "mechanical problems." Solano and the unidentified men were watching through binoculars.

Solano and Garcia had rented the Hertz car that Solano had driven to the airfield. Garcia is a resident of Barranquilla, Colombia, which is one of the primary areas from which marihuana is illegally transported to the United States.

On May 6 Banks, acting on Harris' orders, refueled the Convair with 1,232 gallons which cost $2,464.00 and was paid for with cash and a check. On May 7, Banks, Harris, Rogers, Root and Appellant were seen at a convenience store near the airfield in a maroon pickup and a Winnebago. There was testimony that Winnebagos and similar vehicles are used by marihuana smugglers to transport the marihuana after it arrives in the U.S. From May 7-21 Rogers, who had once been seen deplaning the Convair when it returned to the airfield and introduced himself as Jay Roberts, and others were seen traveling to the airport in the maroon pickup and "checking out" the Convair. Some conspirators were also seen in a green pickup during this time.

Appellant, Baldi and others returned to the airfield in the maroon pickup on May 21. The Convair was loaded and the engines were cranked. The witness could not remember whether the plane took off. That evening, the maroon pickup was followed as it went to the Windridge Apartments in Austin where the occupants went inside an apartment. Later, the green pickup arrived, and these men also went into the apartment. The men talked for about an hour.

Baldi, using the name of Stanfield, and Appellant, using "Kyle Rogers" as an alias, had rented the unfurnished apartment in April. The green pickup's registration lists its owner as Alpha K Industries.

The Convair made another illegal flight May 23. It landed at Grayson on May 24, and later that same day arrived in Waco with three crew members including Appellant.

At this time, Harris instructed Banks to get new fuel tanks because the plane had "gotten out over the Gulf" and was unable to transfer fuel. The new fuel pump was installed about May 26.

Appellant and Baldi were seen at the airfield loading items into the Convair May 26. The Cadillac and maroon pickup were also there. The Convair was again fueled with 1,600 gallons. Appellant and Banks then traveled to the Sheraton Hotel in the Cadillac. The maroon pickup and a motor home with Michigan license plates was also there. The same motor home was seen the next day at the airfield.

The Convair departed on its final trip on May 27. That day Appellant and an unknown male entered a room at the Sheraton which was registered to Stanfield (a/k/a Baldi). Later, two men were observed arriving at the airfield in the maroon pickup and taking off in the plane which headed in a southerly direction. The pickup stayed at the airfield until June 7.

About May 30 Harris called Banks and told him the Convair had crashed in Colombia because of overloading and a wet runway; the pilots were "okay" and would be coming in through the southeastern U.S.

Ralph Porras and an unidentified woman arrived at the airfield in his car on June 7th to retrieve the pickup.

Porras had once listed his occupation as a security guard for Alpha K Industries.

Appellant and Baldi were questioned in Miami on June 8 after they came in on the same flight from Colombia. They told the customs agent they did not know each other. Appellant said his passport had been destroyed when his private plane crashed in Colombia even though the passport had been seized in 1979 by an investigator for the Travis County District Attorney's office. Baldi told the agent his passport had been stolen in Colombia. Neither Appellant nor Baldi had luggage.

Banks later met Harris in Austin where Harris, who had not yet paid for the Convair, told Banks the plane would be paid for.

Appellant's first ground of error asserts there is no evidence that the alleged combination was formed with the intent to possess and import marihuana. Viewed in a light most favorable to the verdict, we find there was sufficient evidence to show such intent considering the following: the size of the plane and the expense of operating it; the modifications that were made for long distance flights; the illegal flights; the numbers of people involved; the use of aliases by conspirators; Harris' express declaration to Banks that the plane was to be used to "run a load"; Appellant's denial that he knew Baldi and his lying about his passport; the sham corporation; payments in cash of large sums; the ties to Colombia.

Ground of error two contends there was insufficient evidence to establish the intent to possess and import marihuana because the accomplice testimony of Banks was not corroborated. To test the sufficiency of the corroboration of an accomplice witness, we must eliminate from consideration the evidence of the accomplice

witness and then examine the evidence of the other witnesses to ascertain if it is of incriminating character which tends to connect the defendant with the commission of the offense. If there is such evidence, the corroboration is sufficient; otherwise, it is not. The corroborative testimony need not directly link the accused to the crime or be sufficient in itself to establish guilt. The corroboration need only make the accomplice's testimony more likely than not. *Meyers v. State*, 626 S.W.2d 778, 780 (Ct. Cr. App. 1982); *Carrillo v. State*, 591 S.W.2d 876, 883 (Ct. Cr. App. 1979); TEX. CODE CRIM. PROC. ANN. article 38.14.

Over thirty witnesses testified—almost twenty of which were law enforcement or customs officers. The State introduced eighty-two exhibits, many of which were photographs of those involved in the work on the plane. The testimony of Banks was corroborated in almost every detail except for Harris' express declaration that the plane was to be used to "run a load." The evidence from other witnesses was of an incriminating character, it tended to connect the defendant with the commission of the offense, and it showed Banks' testimony to be more likely than not. Therefore, the evidence was sufficient and ground two is overruled.

Ground three maintains the evidence was insufficient to sustain the conviction because the state did not prove the knowledge of Appellant. A person acts intentionally with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. TEX. PENAL CODE ANN. § 6.03(a). He acts knowingly with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. He acts

knowingly with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. § 6.03(b).

Intent can be inferred from the acts, words or conduct of the Appellant. *Romo v. State*, 593 S.W.2d 690, 693 (Ct. Cr. App. 1980). Proof of Appellant's culpable mental state will generally rely on circumstantial evidence. *Heckert v. State*, 612 S.W.2d 549, 550 (Ct. Cr. App. 1981). Evidence which showed Appellant's knowledge includes the following: he made several illegal flights and attempted to make other illegal flights; he saw tanks for extra fuel had been installed; he assisted in installing a new fuel pump; he rented the Austin apartment using an alias; he exited the U.S. in an unairworthy plane; he denied knowing Baldi; he lied about his passport. These and other circumstances were sufficient to show Appellant's knowledge of the purpose of the conspiracy.

Ground of error four asserts there was no proof Appellant performed the overt act set out in the indictment. The indictment alleges Appellant on or about May 27, 1980 "did then and there conspire . . . and did in pursuance of said agreement, perform an overt act, namely fly in an airplane along with Anthony Thomas Baldi." Appellant contends that the State was required to prove the alleged overt act occurred on May 27, 1980. This is not the law.

The date alleged in an indictment "must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation." TEX. CODE CRIM. PROC. ANN. article 21.02(6). The State is not bound by the date alleged and may prove the offense was committed before,

on or about the date alleged. *Glenn v. State*, 436 S.W.2d 344, 346 (Ct. Cr. App. 1969).

A conspiracy is, by its very nature, an ongoing crime. The crime is committed when the unlawful agreement is entered into and an overt act is performed pursuant to that agreement. *McCann v. State*, 606 S.W.2d 897, 898 (Ct. Cr. App. 1980); *Smith v. State*, 363 S.W.2d 277 (Ct. Cr. App. 1963); TEX. PENAL CODE ANN. § 71.01(b). A completed offense is not an essential element of the conspiracy charged, nor must the overt act be a criminal act. *McCann, supra.*

The overt act alleged, the flying of the plane, was proven to have occurred many times. Therefore, the evidence is sufficient to sustain the conviction.

Ground five contends the evidence was insufficient to prove that at least five persons collaborated in carrying on the criminal activities. TEX. PENAL CODE ANN. § 71.01(a). Appellant concedes many persons were photographed or identified in the plane's vicinity but maintains only Banks, Harris, Baldi and Appellant participated in procuring, repairing and flying the plane.

In addition to the four men named above, several others were involved in loading and maintaining surveillance on the plane and transporting vehicles to and from Austin. The evidence clearly shows that other not only associated with Banks, Harris, Baldi and Appellant but actively participated in the conspiracy. The ground is overruled.

Ground of error six asserts the court erred in denying Appellant's request for an instruction in the charge on the lesser included offense of conspiracy to possess marihuana.

The conspiracy provisions of TEX. PENAL CODE ANN. § 1501 do not apply to violations of the Texas Controlled Substances Act. *Baker v. State*, 547 S.W.2d 627, 628 (Ct. Cr. App. 1977); *Dubry v. State*, 582 S.W.2d 841, 844 (Ct. Cr. App. 1979). Therefore, there is no offense of conspiracy to possess marihuana. The trial court could not have instructed the jury on this "lesser included offense" when it constitutes no offense at all. Ground six is overruled.

In his seventh ground of error, Appellant challenges the sufficiency of the evidence to prove Appellant acted by "fraud, misrepresentation and deception." The following are illustrative of Appellant's acts of fraud, misrepresentation and deception and were sufficient to sustain the conviction: flying in an uncertified plane, using an alias to rent the apartment where the conspirators met, lying about his association with Baldi and lying about his passport.

Ground of error eight asserts error by the cout in overruling Appellant's objection to the prosecutor's argument that he felt sorry for Appellant's mother, but that he felt "more sorry for the rest of the mothers in this country that have to worry about their children, the mothers that have to worry, what's going on in our school." Also, Appellant objected to the prosecutor's argument that the 10,000 pounds of marihuana would not be for the private use of the conspirators but rather for sale. "Who are they going to sell it to? They're going to sell it to anybody who will buy it, at any age. They're going to sell it to pushers, who will, then, in turn, sell it to school children, college students."

In order to be "within the stamp of approval jury arguments need to be within the area of (1) summation of the evidence; (2) reasonable deduction of the evi-

dence; (3) answer to argument of opposing counsel, or (4) a plea for law enforcement." *McClory v. State,* 510 S.W.2d 932, 934 (Ct. Cr. App. 1974); *Alejandro v. State,* 493 S.W.2d 230, 231 (Ct. Cr. App. 1973).

Appellant did not request that the jury be instructed to disregard the argument. Unless an argument is so inflammatory that its prejudicial effect could not have been alleviated by an instruction to disregard, the failure to request such an instruction waives any possible error. *Parr v. State,* 606 S.W.2d 928, 931 (Ct. Cr. App. 1980); *Duran v. State,* 505 S.W.2d 863, 866 (Ct. Cr. App. 1974). Furthermore, the statements were reasonable deductions from the evidence, *Miller v. State,* 566 S.W.2d 614, 619 (Ct. Cr. App. 1978), and valid pleas for law enforcement, *Walthall v. State,* 594 S.W.2d 74, 83 (Ct. Cr. App. 1980).

Appellant's ninth ground contends the court erred in denying Appellant's motion for mistrial after the court sustained his objection and instructed the jury not to consider the prosecutor's remarks regarding handwriting experts. The prosecutor said, "My experience with handwriting examiners are, they want more [than just a signature]. They like a whole alphabet written out, and so forth. And Mr. Segrest requested of the Defense, that that be provided."

Prior to the prosecutor's remark, Appellant's counsel argued the Appellant was not the person who signed the apartment lease with the name "Kyle Rogers." A portion of that argument was as follows:

> I submit to you . . . Ladies and Gentlemen of this Jury, if that was the signature of Hank Erwin, they would have had a handwriting expert to say, yeah, sure the person that signed that is Henry Washington—Hank Washington Erwin—that's who

signed this document? But they didn't choose to do that. And I submit to you, the reason that they didn't is, because it is not his signature.

Appellant's counsel invited the statement of the prosecutor when he stated the State did not bring in a handwriting expert because the signature was not that of the Appellant. *White v. State,* 618 S.W.2d 65, 67 (Ct. Cr. App. 1981); *Garrison v. State,* 528 S.W.2d 837, 840-841 (Ct. Cr. App. 1975). Moreover, any possible error was cured by the trial court's prompt instruction to disregard the statement. *DeBolt v. State,* 604 S.W.2d 164, 169 (1980); *Gholson v. State,* 542 S.W.2d 395, 399 (1976).

The tenth ground of error assails the trial court's action in overruling the motion to quash the indictment. The motion to quash challenged the indictment for lack of specificity in that it did not state, "where this Defendant flew in an airplane, when this Defendant flew in an airplane, and how such flight aided in the conspiracy or what portion of the agreement was carried out through this flight in an airplane." Similarly, the eleventh ground also asserts the motion to quash should have been granted because the indictment did not specifically set out Appelland's role in the conspiracy.

The indictment alleged that Appellant:

> . . . on or about the 27th day of May, A.D. 1980, and before the presentment of this indictment, in the County [McLennan] and State [Texas] aforesaid, . . . with intent to establish, maintain and participate in a combination and the profits of a combination which consisted of at least five of the following people, to wit: . . . which said persons intentionally and knowingly collaborated in carrying on the criminal activity of the illegal and unlawful

possession of a controlled substance, to wit: a useable quantity of marihuana, over the amount of four (4) ounces, did then and there knowingly conspire with one or more person in said combination to engage in conduct which would constitute the offense of the illegal possession of a controlled substance, namely a useable quantity of marihuana, over the amount of four (4) ounces, by fraud, misrepresentation and deception, namely by illegally importing said useable quantity of marihuana into the United States of America by airplane, and the said HENRY WASHINGTON ERWIN, III, did in pursuance of said agreement, perform an overt act, namely fly in an airplane along with Anthony Thomas Baldi, ...

The indictment names the place of the offense as McLennan County, Texas. As to the date of the offense, see discussion regarding ground of error four. Everything necessary to be proved was alleged in the indictment. TEX. PENAL CODE ANN. § 71.01; TEX. CODE CRIM. PROC. ANN. article 21.03. The indictment is sufficiently certain to enable Appellant to plead the judgment in bar. TEX. CODE CRIM. PROC. ANN. article 21.04. The allegation of an overt act is in plain and intelligible language. TEX. CODE CRIM. PROC. ANN. article 21.02(7). The language is ordinary and concise and would enable a person of common understanding to know what is meant. It alleges an overt act with sufficient certainty to give appellant notice of the particular offense with which he was charged. The indictment enabled the trial court to pronounce a proper judgment. TEX. CODE CRIM. PROC. ANN. article 21.11. Grounds of error ten and eleven are overruled.

The judgment is affirmed.

GEORGE CHASE
Associate Justice

DO NOT PUBLISH

COURT OF APPEALS

TENTH SUPREME JUDICIAL DISTRICT

Waco, Texas

I, ROBERT G. WATTS, Clerk of the Court of Appeals for the Tenth Supreme Judicial District of Texas, at Waco, hereby certify that the foregoing 11 page(s) contain(s) a true and correct copy of the Opinion filed in said Court on the 3rd day of June, 1982, in the following numbered and entitled cause, to wit:

HENRY WASHINGTON ERWIN, III,

Appellant

No. 10-81-001-CR

THE STATE OF TEXAS,

Appellee

on appeal to said Court from McLennan County, Texas.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, at office in Waco, this the 3rd day of June, 1982.

/s/ ROBERT G. WATTS, Clerk

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE
Austin, Texas

September 22, 1982

I have been instructed to advise that the Court has this day refused the Appellant's petition for discretionary review in Cause No. 0565-82, ERWIN, HENRY W. III

10-81-001

Sincerely yours,

THOMAS LOWE, Clerk

APPENDIX C

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE
Austin, Texas

October 20, 1982

I have been instructed to advise that the Court has this day denied the Motion for Rehearing on the Appellant's petition for discretionary review in Cause No. 0565-82, ERWIN, HENRY W. III

10-81-001

Sincerely yours,

THOMAS LOWE, Clerk